IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10583 of 2007
With
SPECIAL CIVIL APPLICATION No. 10584 of 2007
To
SPECIAL CIVIL APPLICATION No. 10585 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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USMANKHAN SAMRATKHAN PATHAN & 2 - Petitioner(s)
Versus
FATIMABEN WD/O ABBASMIYA HAKIM & 3 - Respondent(s)

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Appearance :
MR AV PRAJAPATI for the Petitioners.
MR AJ MEMON for the Respondents.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 24/09/2007

ORAL JUDGMENT

All the aforesaid three petitions have been preferred by the petitioners (original defendants) in Civil suit no. 3726 of 202. The present petitioners preferred application exh. 36, whereby it was prayed

before the trial court that the suit instituted by the respondents (original plaintiff) bearing Civil Suit no. 3726 of 2002 should be treated as disposed of as an arbitrator was already appointed by the trial court and as the arbitrator has already given an award under Arbitration and Conciliation Act, 1996. This application below exh. 36 in the pending suit was dismissed by the trial court. Hence, the present petitioners (original defendants) have preferred the aforesaid Special Civil Applications.

2. Having heard the learned advocates for both sides and looking to the facts and circumstances of the case, I see no reason to entertain the present petitions, mainly for the following facts and reasons.

(i) It appears from the facts of the case that the respondents are the original plaintiffs. The suit being Civil Suit no. 3726 of 2002 was instituted by the plaintiffs. Looking to the prayer of the suit, it appears that the same was for administration as well as partition of the suit property.

(ii) It also appears from the facts of the case that as per the newly amended provisions of the Civil Procedure Code, wherever it appears to the Court that there exists element of settlement, which may be acceptable to the parties, the Court may send the matter for arbitration to alternative dispute redressal forum which are referred in section 89 of

the Civil Procedure Code. It can be an arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation.

(iii) It also appears, prima facie, from the facts of the case that the respondents (original plaintiffs) preferred an application exh. 26 in Civil suit no. 3726 of 2002 for appointment of an arbitrator. This was objected to by the present petitioners (original defendants). The objections were taken in writing on 1st September, 2003.

(iv) Thus, at a belligerent stage, the matter was sent for arbitration to an arbitrator, namely Mr. Yusufmiya N Hakim, despite objection taken by the original defendants. Thus, as alternative dispute redressal forum, the Court was of the opinion that the matter may be settled and such settlement may be acceptable to the parties and therefore, the order was passed on 3rd September, 2003 and the matter was sent for arbitration.

(v) It appears that the arbitration was proceeded ex parte. The present petitioners (original defendants) who had taken objection for sending the matter to arbitration had never participated in the arbitration proceedings.

(vi) It also appears from the facts of the case that the arbitrator gave his award on 7th April, 2005.

(vii) The present respondents (original plaintiffs) filed Execution Application no.138 of 2005 on the basis of the ex parte award given in their favour.

(viii) Obviously, the petitioners (original defendants) who objected the appointment of the arbitrator, who have never remained present before the arbitrator, who have never participated in the arbitration proceedings, have also objected the arbitration award in Execution Proceeding No. 138 of 2005 on several grounds including the fact that the arbitrator was a nearby relative of the original plaintiffs. Thus, favour and bias was also one of the objections. Looking to all these objections and consistent hostile approach of the original defendants to get rid of this arbitration award, the original plaintiffs moved an application exh. 34 to treat the award as null and void and shown their willingness to proceed with Civil suit no. 3726 of 2002 instituted by them.

(ix) It also appears from the facts of the case that the trial court passed the order below exh. 34 on 9th March, 2007 that as the original plaintiffs in whose favour the award is passed, is praying to proceed with the suit, looking to the objections raised by the original defendants. Execution Proceeding no.138 of 2005 comes to an end.

(x) It also appears from the facts of the case that an application was moved by the original defendants below exh. 36 in Civil suit no. 3726 of 2002 with a prayer that as arbitrator has already given an award, the suit may be disposed of by the Court or as the arbitration proceedings have already concluded, the suit comes to an end automatically. This contention has not been accepted by the trial

court against which the present Special Civil Application has been filed.

(xi) Having heard the learned advocates for both the sides and looking to the facts and circumstances of the case and looking to the provisions of section 89 of of the Civil Procedure Code and the judgment delivered by the Hon'ble Supreme Court reported in **2003(1) SCC, 49, especially, para-10** thereof, the order passed by the trial court is absolutely true, correct, legal and in consonance with the facts of the case. The proceedings were initiated by the trial court for arbitration as per order dated 3rd September, 2002 despite objections raised by the original defendants. Ex parte award was passed and there are lot of allegations by the original defendants for arbitration proceedings and approach of the arbitrator. In this set of circumstances, the original plaintiffs moved an application below exh. 34 which was allowed vide order dated 9th March, 2007 by the trial court, bringing to an end, Execution Proceedings. The original suit filed by the present respondents (original plaintiffs) remains as it is, as per the judgment delivered by the **Hon'ble Supreme Court in the case of Salem Advocate Bar Association, T.N. vs. Union of India reported in 2003(1) SCC, 49.** Para-10 of the said judgment reads as under:

> "10. In certain countries of the word where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency

> of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute, would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or medication or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial." (Emphasis supplied)

This aspect of the matter has not been properly appreciated by the trial court, more so, looking to the application given by the original plaintiffs below exh. 26 in Civil suit no. 3726 of 2002. The prayer in that application reads as under:

"(A) That this Hon'ble Court may be pleased to pass an order under section 89 of CPC appointing Arbitrator/Mediator/Conciliation for resolving the disputes and differences between the parties to this suit.
(B) Any other and further orders as may be deemed fit and proper may be granted."

In view of the aforesaid prayer, the Court has taken a recourse of the newly amended provisions of section 89 of the Civil Procedure Code. It must be kept in mind that if arbitration proceedings are availed under section 89 of the Civil Procedure Code by the consent of the parties and by agreement of the

parties to the suit, **then only**, such a suit will go out of Court proceedings and not otherwise. If there is a no consent by the parties to the suit, and despite objections being taken by either parties to the suit and the matter is referred by the Court under section 89 of Civil Procedure Code, to an arbitrator, such proceedings under Arbitration will not put the original suit out of the court proceedings. This aspect of the matter has been properly kept in mind by the trial court. The court proceedings in the facts of the present case, namely suit no. 3726 of 2002 remain intact and as it is in the court, as the trial court has sent the matter for arbitration under section 89 of the Civil Procedure Code not with the consent of the parties, but despite objections by the original defendants.

5. As a cumulative effect of all the aforesaid facts, reason and judicial pronouncement, there is no error committed by the trial court in dismissing Chamber Summons exhs. 35 and 36 in the civil suit. There is no substance in the present petitions. Hence, the same are dismissed. Rule is discharged in each petition. Ad-interim relief granted earlier stands vacated.

(D.N.Patel,J)

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